

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

STATE OF DELAWARE DEPARTMENT OF  
NATURAL RESOURCES AND ENVIRONMENTAL  
CONTROL,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS  
(USACOE); the HONORABLE JOHN MCHUGH,  
Secretary of the Army, in his official capacity; the  
HONORABLE JO-ELLEN DARCY, Assistant Secretary  
of the Army for Civil Works, in her official capacity;  
LT. GENERAL ROBERT VAN ANTWERP, JR.,  
Commander, USACOE, in his official capacity; and LT.  
COL. THOMAS TICKNER, Commander, USACOE,  
North Atlantic Division, Philadelphia District, in his  
official capacity;

Defendants.

C.A. No. 09-CV-821

**MEMORANDUM OF LAW OF *AMICUS CURIAE* SENATOR ARLEN SPECTER  
IN OPPOSITION TO THE STATE OF DELAWARE'S  
MOTION FOR A PRELIMINARY INJUNCTION**

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## TABLE OF CONTENTS

I. Interest of Senator Arlen Specter as <i>Amicus Curiae</i> .....	1
II. Argument.....	2
A. The Public Interest Weights Heavily Against Granting a Preliminary Injunction Because Pennsylvanians Will Be Deprived of the Economic Benefits Congress Intended to Confer on the Delaware Valley Region in Authorizing the Project.....	3
B. Delaware Has Not Established and Cannot Establish that a Preliminary Injunction Is Necessary to Avoid Irreparable Harm Pending Final Judgment .....	5
III. Conclusion.....	9

## TABLE OF AUTHORITIES

### Cases

<i>Continental Group, Inc. v. Amoco Chem. Corp.</i> , 614 F.2d 351 (3d Cir. 1980).....	6
<i>Nutrasweet Co. v. Vit-Mar Enterprises, Inc.</i> , 176 F.3d 151, 153 (3d Cir. 1999).....	2
<i>P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstar, LLC</i> , 428 F.3d 504 (3d Cir. 2005).....	2
<i>N.W. Controls, Inc. v. Outboard Marine Corp.</i> , 317 F. Supp. 698 (D. Del. 1970).....	6
<i>Winter v. Natural Resources Defense Council</i> , 129 S. Ct. 365 (2008).....	2

### Statutes

Water Resources Development Act of 1992, Pub. L. 102-580, § 101(6), 106 Stat. 4797, 4802 (1992).....	1
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### Other

Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, <i>Federal Practice &amp; Procedure</i> (3d ed.).....	3
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## **I. STATEMENT OF *AMICUS CURIAE*<sup>1</sup>**

First elected in 1980, *amicus curiae* Arlen Specter is the senior Senator from the Commonwealth of Pennsylvania in the United States Senate. He serves on the Committees on Appropriations, Environment and Public Works, Judiciary, and Veterans' Affairs, as well as the Special Committee on Aging. He previously served as both the Chairman of and the Ranking Member on the Committee on the Judiciary and the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies of the Committee on Appropriations.

Senator Specter has been actively engaged with the project that underlies this case—the deepening of the Delaware River's main shipping channel—for nearly his entire tenure in the Senate. In 1983, he led members of Pennsylvania's Congressional delegation in urging the Army Corps of Engineers (Corps) to study whether the Delaware River should be deepened. In 1992, he was instrumental in securing Congressional authorization for the Corps to undertake the project. *See* Water Resources Development Act of 1992, Pub. L. 102-580, § 101(6), 106 Stat. 4797, 4802 (1992). Senator Specter has also been instrumental in securing appropriations for the project in excess of \$75 million. *See* Federal Defs.' Response Opp. Delaware's Mot. Prelim. Inj. 23.

As a United States Senator, Senator Specter has an interest in ensuring that these Congressional enactments relating to the project be given effect without further delay and that Congress's constitutional authority to regulate interstate commerce is not frustrated by the States of Delaware or New Jersey. As Pennsylvania's senior Senator, Specter has an interest in

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<sup>1</sup> Senator Specter accepts the statement of the facts and the nature and stage of the proceedings set forth in the Federal Defendants' Response in Opposition to Delaware's Motion for a Preliminary Injunction.

ensuring that his constituents receive the substantial economic benefits that Congress intended the project would confer on them.

## II. ARGUMENT

Neither the brief submitted by Delaware nor the brief submitted by New Jersey cites, let alone addresses, the Supreme Court's most recent pronouncement on the *limited* circumstances under which a court may issue a preliminary injunction, *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008). That decision emphasized, to a much greater extent than any other recent decisions of the Court, that a preliminary injunction is an "extraordinary remedy," *id.* at 376, that may issue only "upon a clear showing," *id.*, by the movant that he satisfies *each* of the following four requirements: (1) that "he is likely to succeed on the merits;" (2) that "he is likely to suffer irreparable harm in the absence of a preliminary injunction;" (3) that "the balance of equities tips in his favor"; and (4) "that an injunction is in the public interest." *Id.* at 374. If the movant fails to satisfy any one of these requirements, he is not entitled to a preliminary injunction, no matter how strong a showing he makes with respect to any or all of the others. *See id.* Pre-*Winter* case law of the Third Circuit is in accord. *See, e.g., Nutrasweet Co. v. Vit-Mar Enterprises, Inc.*, 176 F.3d 151, 153 (3d Cir. 1999) ("A plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate."); *see also, e.g., P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstar, LLC*, 428 F.3d 504, 508 (3d Cir. 2005) (reaffirming that the moving party must satisfy each requirement).

The Federal Defendants and the Philadelphia Regional Port Authority (Port Authority) have both established in their briefs that Delaware fails to satisfy any one of the required elements. Senator Specter offers this brief to make the following two additional points that bear on the disposition of Delaware's motion.

**A. The Public Interest Weighs Heavily Against Granting a Preliminary Injunction Because Pennsylvanians Will Be Deprived of the Economic Benefits Congress Intended to Confer on the Delaware Valley Region in Authorizing the Project**

*Winter* emphasized, to a much greater extent than any prior decisions of the Court, that a district court must weigh not only the harms to the parties that will result from the denial or grant of a preliminary injunction, but also to the public. *See* 129 S. Ct. at 377 (“In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). Just as consideration of the public interest may weigh in favor of injunctive relief, so too may it weigh against injunctive relief. In fact it may, as in *Winter*, even weigh strongly against the grant of injunctive relief. *See id.*; *see generally* Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, 11 *Federal Practice & Procedure* § 2948.4 (3d ed.) (“It frequently has been emphasized that whether the public interest either might be furthered or might be injured by an injunction should be given considerable weight.”).

The Federal Defendants invoke the public interest in carrying out Congress’s intentions with respect to the deepening project, Fed. Defs.’ Resp. Opp. Delaware’s Mot. Prelim. Inj. 39-40, and the Port Authority invokes the public interest in preserving the federal government’s authority to regulate the “navigability of interest waters.” Port Auth. Mem. 37-38. Senator Specter agrees that these are important interests. He submits this brief to emphasize another public interest that weighs heavily against preliminary injunctive relief: the public’s interest in realizing the economic benefits that Congress intended to confer on the Delaware Valley Region when it authorized and later funded the project.

Congress has already determined—first by authorizing the project in 1992 and then by appropriating funds for it year-after-year in excess of \$88 million, *see supra* § I—that substantial

economic benefits will result from the project. In fact, the *statutory* findings that precede the 1992 authorization of the project expressly provides, among other things, that the project “will pay immediate and long-term dividends in jobs and economic productivity.” Pub. L. 102-580, § 101(6), 106 Stat. at 4802; *see also, e.g., id.* § 2(10) (“infrastructure investment . . . creates wealth”). The Court should accept these legislative findings as authoritative.

Congress’s findings are reinforced by the compelling evidentiary submission offered by the Port Authority in opposition to Delaware’s motion. *See* Port Auth. Mem. 7-9, 36-37, Ex. B (Rochford Decl.), Ex. C. (Paylor Decl.), Ex. D (Holt Decl.). According to the Port Authority’s submission, the Delaware River ports currently “support over 75,000 direct, indirect, and induced jobs, generate over \$ 4 billion in economic revenues, \$1.4 billion in wages and salaries, and contribute over \$150 million in state and local taxes.” Port Auth. Mem., Ex B. (Decl. Dennis Rochford) ¶ 8. The thousands of employees represented by the International Longshoremen’s Association who work at the Delaware River’s ports alone earn on average \$50,000 per year. *Id.*, Ex. C (Decl. James H. Paylor, Jr.) ¶ 7. *See generally* Port Auth. Mem. 3-4, 7-9, 36-37 (setting forth economic need for the project). These jobs do not require a college or advanced degree, and many do not require a high school diploma. According to one declaration, they are “working class, family sustaining jobs Ex. C (Decl. James H. Paylor, Jr.) ¶¶ 6, 8. *See generally* Port Auth. Mem. 7-9 (laying out economic need for the project). Additionally, the region’s consumers benefit from the reduced shipping costs achieved when goods are imported through Delaware River ports. Ex. A (Decl. James T. McDermott) ¶ 32.

These economic benefits, the Port Authority establishes, may well be lost if the project does not proceed without further interference from Delaware. It is beyond serious question that the continued viability of the Delaware River ports—to say nothing of their potential to expand

their market share—depends on their ability to compete with other ports along the East Coast that have *already* completed or began the deepening of their shipping channels to accommodate the larger cargo vessels that shipping companies are now using and will increasingly use in years to come. *Id.*, Ex. B. (Decl. Dennis Rochford) ¶¶ 11-22; *id.*, Ex. A (Decl. James T. McDermott) ¶ 33. The Delaware River ports may never reclaim shipping business diverted to other ports along the East Coast, even if the deepening project eventually goes forward. *Id.*, Ex. B. (Decl. Dennis Rochford) ¶ 22.

Evidence of irreparable harm to the region's economy aside, it is clear that the residents of the Delaware Valley region have already waited far too long to receive the economic benefits Congress intended. Any further delays would be contrary to the public interest, as expressed by Congress's legislative findings, even without regard to any showing of irreparable injury to the region's economy.

A final point bears emphasis: Senator Specter does not contend that economic interests trump environmental interests. Rather, he contends that the allegations of environmental harms raised by Delaware are unfounded, *see* Fed. Defs.' Br. 13-16, and that the economic benefits associated with the project should therefore be given substantial weight in deciding whether to preliminary enjoin—and thereby further delay—the Delaware River deepening project.

**B. Delaware Has Not Established and Cannot Establish that a Preliminary Injunction Is Necessary to Avoid Irreparable Harm Pending Final Judgment**

The question before the Court is not whether Delaware is likely to suffer irreparable harm at some point in the future, but whether it is likely to suffer irreparable harm before the Court can



issue a final judgment.<sup>2</sup> Only pre-judgment irreparable harm counts. *E.g., Continental Group, Inc. v. Amoco Chem. Corp.*, 614 F.2d 351, 356-57 & n. 9 (3d Cir. 1980). This rule often finds expression in the requirement that the moving party establish that the irreparable harm is likely to be “immediate.” *See* Fed. Defs.’ Response 13. Any harm Delaware may suffer after the issuance of a final judgment—no matter how irreparable—can be prevented by the issuance of a permanent injunction as part of the Court’s final judgment. *See, e.g., id.*; 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (3d ed.) (“Only when the threatened harm would impair the court’s ability to grant an effective remedy is there really a need for a preliminary relief. Therefore, if a trial on the merits can be conducted before the injury would occur there is no need for interlocutory relief.”); *see also, e.g., N.W. Controls, Inc. v. Outboard Marine Corp.*, 317 F. Supp. 698, 703 (D. Del. 1970) (likelihood of trial being conducted within three months weighed against finding of irreparable harm).

The rule is dispositive of Delaware’s request for a preliminary injunction. Delaware contends that the degradation of the environment—in particular, its wetlands—is irremediable except by the issuance of a preliminary injunction. Delaware’s Mem. Law Supp.

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<sup>2</sup> Delaware misapprehends the purpose of a preliminary injunction in another filing with the Court. In its brief opposing the Philadelphia Regional Port Authority’s motion to intervene, Delaware contends that it is not seeking a permanent injunction, only a preliminary injunction to enjoin the Federal Defendants until such time as they comply with the environmental laws with which they have *allegedly* failed to comply. *See* Delaware’s Mem. Law Opp. Philadelphia Regional Port Auth. Mot. Interv. 4. That assertion contradicts Delaware’s own complaint, which prays for a permanent injunction. *See* Delaware’s Compl. ¶¶ 61-65. In any event, courts do not issue preliminary injunctions except as an interim measure until permanent injunction can be issued. What Delaware really seeks, apparently, is a permanent injunction of conditional duration.

Mot. Prelimin. Injun. 29; New Jersey's Br. Supp. Delaware's Mot. Prelim. Inj. 12.<sup>3</sup> It offers no evidence, however, as to the immediacy of the claimed harm, and certainly no evidence that it will suffer any harm before the final-judgment stage. Indeed, it offers no evidence that it is likely to suffer any harm (irreparable or otherwise) at *any* time in the future. *See* Del. Mem. Law Supp. Mot. Prelim. Inj. 27-30.

As the Federal Defendants establish, the irreparable harm Delaware seems to *allege* (but not establish) it will suffer would not occur for at least another year (December 2010). Not until then will the project involve any discharges to wetlands and hence the irreparable environmental harm on which Delaware bases its claimed entitlement to a preliminary injunction. *See* Fed. Defs.' Response 14 ("[P]roject construction will not result in any discharges to wetlands for at least the next year. Until December 2010, deepening will be limited to Reach C and all dredged material will be pumped directly to the Killcohook CDF."); *accord*, Port Auth.'s Proposed Mem. Law Opp. Mot. Prelim. Inj. (hereinafter Port Auth. Mem. 32; *see also id.* (noting that "no further river deepening is planned until December 2010"); Fed. Defs.' Br. 15 ("Any impacts from the deepening of Reach C will be largely identical to impacts that have been occurring since at least 1973 with regular maintenance dredging."); Port Auth. Mem. 1 (noting "limited scope of near-term work, and its similarity to annual maintenance dredging that has been occurring for thirty-six years"). Any irreparable harm that will *allegedly* (but has not been established will) occur in December 2010 can (subject of course to the Court's docket) be fully

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<sup>3</sup> Delaware also makes the unsupported argument that, if the project goes forward, its "sovereign authority" will be irreparable damaged. Del. Mem. Law Supp. Mot. Prelim. Inj. 28. For the Federal Defendants' response, *see* Fed. Defs.' Response Opp. Delaware's Mot. Prelim. Inj. 13.

remediated at the final-judgment stage by the issuance of a permanent injunction. Accordingly, there is no basis to issue a preliminary injunction.

### III. CONCLUSION

For these reasons and those advanced in the briefs filed by the Federal Defendants and the Port Authority, the Court should deny Delaware's motion for a preliminary injunction and, as Congress intended, allow the Army Corps of Engineers to proceed with the Delaware River deepening project.

Dated: November 25, 2009

Respectfully submitted,

/s/ Peter C. Hughes

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